

The Appeals Board will first consider whether claimant submitted timely written claim pursuant to either the accidental injury or occupational disease statutes. Under K.S.A. 44-520a, claimant is obligated to submit timely written claim within 200 days of the date of

accident. Under K.S.A. 44-5a17, the claimant is obligated to provide written notice of occupational disease within 90 days after disablement. In this instance, claimant has alleged accidental injury and/or occupational disease through each and every working day up to January 23, 1998. However, claimant's date of termination with respondent was January 22, 1998, which would be the last day upon which claimant could have alleged occupational disease or accidental injury. Both parties stipulate claimant's written claim was received by respondent on or about February 10, 1998, when respondent received a letter from claimant's attorney. Under either statute, written claim for an accident date through claimant's last day worked would be timely.

With regard to whether claimant suffered accidental injury or occupational disease arising out of and in the course of the employment, the Appeals Board must consider the medical testimony presented in this matter. Dr. Richard A. Claiborne, the pulmonary specialist from Wichita, Kansas, had the opportunity to examine claimant on several occasions. He diagnosed possible mild asthma but found claimant's chest x-rays, lung capacity, and pulmonary functions all to be normal. He noted that "no one knows the cause of asthma," and that claimant may have been asymptomatic with asthma before his work or the asthma may be secondary to his work with occupationally induced asthma. He also indicated in the January 27, 1998, office note, that claimant had symptoms of exercise induced asthma which became symptomatic after claimant played racquetball for approximately 10 minutes.

Additional evidence from claimant's coworkers and supervisors indicate claimant has been a smoker of either cigarettes and/or marijuana for many years. Claimant worked with Michael Hahnfeld, the respondent's foreman, for several years at a prior employment. Mr. Hahnfeld testified that claimant had ongoing coughing difficulty which led him to believe claimant may have a lung problem. Mr. Hahnfeld also testified that claimant was a daily smoker of marijuana for many years.

Donald Gordon, a coworker of claimant, testified that he had personally observed claimant smoking marijuana on more than one occasion as recently as November or December, 1997.

The medical records from Dr. Claiborne indicate he was advised that claimant had been a cigarette smoker but had quit smoking approximately four years prior. There is no indication in Dr. Claiborne's medical records that he was aware of claimant's marijuana use. In addition, Dr. Claiborne's medical report of February 3, 1998, indicates claimant may have had an asymptomatic asthma condition before this alleged injury, which is indication that he was unaware of claimant's prior history of coughing while working for Vim Trailer. Mr. Hahnfeld described the coughing as being "pretty frequent" and "pretty bad".

In workers compensation litigation it is claimant's burden to prove all of the elements upon which his right to benefits depend. See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g). In this instance, the Appeals Board finds that claimant has failed

to prove either accidental injury or occupational disease arising out of and in the course of his employment. The Appeals Board therefore finds that the Order of the Administrative Law Judge denying claimant benefits should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon F. Frobish dated March 3, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
D. Steven Marsh, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director